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No. 94-834

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORTH STAR STEEL COMPANY,
Petitioner,

v.

CHARLES A. THOMAS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. THE COURT'S ESTABLISHED BORROWING DOCTRINE FAVORS APPLICATION OF THE NLRA'S SIX-MONTH LIMITATIONS PERIOD TO WARN.

Respondents' briefs raise every plausible (and not so plausible) distinction between the Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 *et seq.* ("WARN" or "the Act"), and the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). However, they completely fail to refute two essential, dispositive tenets of North Star's argument: 1) that the NLRA "clearly provides a closer analogy" to WARN than any available state limitations period; and 2) that "the federal policies at stake and the practicalities of litigation" make the NLRA a "significantly more appropriate vehicle for interstitial lawmaking" in this instance.[1]

A. Respondents Present A Distorted View Of The Court's Current Borrowing Doctrine.

Respondents and the government present a remarkably narrow and erroneous interpretation of the Court's limitations borrowing doctrine. They suggest that the doctrine is fundamentally unchanged from 165 years ago, and that it permits the borrowing of federal statutes of limitations in only the most extraordinary of circumstances. *See* Government Br. 11 p.4 (current doctrine is only "slightly different" from approach taken by *McCluny v. Sullivan*, 3 Pet. (28 U.S.) 270, 277-78 (1930)). Indeed, Respondents go so far as to imply that the Court wishes to limit federal borrowing to only three circumstances: "hybrid" duty of fair representation cases, RICO claims, and implied causes of action derived from federal

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[1] *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 172 (1983); *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 148 (1987); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 356 (1991).

statutes that contain explicit limitations periods. Thomas Br. 22, 30; Steelworkers Br. 12-13.

Respondents' myopic view of the Court's doctrine, however, ignores the "decade-long drift away from the traditional practice of 'borrowing' the statute of limitations of the forum state's most analogous cause of action." *The Supreme Court: 1990 Term—Leading Cases*, 105 Harv. L. Rev. 399, 400 (1991); *see also Halkias v. General Dynamics Corp.*, 31 F.3d 224, 229 n.11 (CA5) ("The 'norm' of borrowing state limitations periods has been subject to steady erosion."), *reh'g en banc granted* (Sept. 22, 1994). Indeed, their contentions overlook the half-century of slow but steady evolution that ultimately led to *DelCostello*'s historic retreat from exclusive state law borrowing.[2]

Respondents contend that the Court's holdings in *DelCostello*, *Agency Holding*, and *Lampf* constitute no more than "narrow exceptions" to the Court's earlier borrowing decisions. Thomas Br. 9. Their plea is to resurrect the superseded tests stated in pre-*DelCostello* cases to bar application of the NLRA limitations period to WARN. What Respondents fail to recognize, however, is that *DelCostello* and its progeny have *substantially broadened* the appropriate application of federal law to set federal limitations periods. By way of comparison, in *DelCostello*, the Court drastically expanded the "narrow exception" *Occidental* test advanced by Respondents, stating that federal courts "may reject a state time limitation *not only* when it is in direct conflict with federal policy, *but also* when the state limitations period is significantly

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[2] *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946) (recognizing that any limitation of a federal right is a matter of federal, not state, law); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958) (preempting application of state limitations period for federal common law claim joined with analogous federal statutory claim); *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977) (state limitations periods could not be applied to federal statutes if they would "frustrate or interfere with the implementation of national policies").

less appropriate than a specific federal alternative." Ellen E. Kaulbach, *A Functional Approach To Borrowing Limitations Periods For Federal Statutes*, 77 Cal. L. Rev. 133, 143 (1989) (emphasis added). It is this modern view of federal borrowing that governs the applicability of the NLRA to WARN—not the highly restrictive test advocated by Respondents.

Unwilling to accept the significance of *DelCostello*—and the Court's subsequent embrace of practical federal borrowing to achieve uniformity in *Agency Holding* and *Lampf*—Respondents dismiss these decisions as aberrations. They then erroneously suggest that the Court's 1989 application of a state law limitations period in *Reed v. United Transportation Union*, 488 U.S. 319 (1989), reflects the Court's "predominant trend." Thomas Br. 12.

In *Reed*, the Court was confronted with the need to select a statute of limitations for actions arising under the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411(a)(2), a federal provision aimed at protecting union members' free speech and assembly rights. Instead of following pre-*DelCostello* precedent and attempting to uncover some vague analogy to state law, the Court focused on the LMRDA's relationship to other federal laws. After determining that the statute was not really a labor law, but rather had as its "core purpose" the protection of First Amendment rights, the Court decided to apply the same uniform "characterization" that it previously borrowed for another federal statute protecting constitutional rights: 42 U.S.C. § 1983. *Id.* at 326-27. That characterization happened to be to a state statute of limitations—largely because at the time the Section 1983 period was decided, federal law had not been considered as an available alternative. *See Wilson v. Garcia*, 471 U.S. 261 (1985) (Court selected state personal injury statutes to govern uniformly all claims brought under 42 U.S.C. § 1983, without consideration of federal alternatives).

Accordingly, rather than reflecting a "trend" favoring state law borrowing, *Reed* properly is interpreted as

further support for the Court's post-*DelCostello* movement away from *ad hoc* case-by-case state law borrowing—and its corresponding "conflict, confusion, and uncertainty"—and towards creation of uniform limitations periods for federal law. *Wilson*, 471 U.S. at 266. While, in *Wilson*, the Court initially attempted to obtain such uniformity through selection of a single state-law limitations characterization that, in further interests of uniformity, was later applied in *Reed*, the Court quickly recognized the inherent superiority of borrowing *federal* limitations periods to obtain this desired uniformity. *See Agency Holding, supra; Lampf, supra.*[3] It is these two holdings that marry *DelCostello's* suggestion of borrowing "clearly analogous" federal statutes with *Wilson's* preference for uniformity. Indeed, it is *Agency Holding* and *Lampf* that truly represent the Court's "predominant trend."

B. Respondents Fail To Disprove Petitioner's Contention That The NLRA Provides A Closer Analogy To WARN Than State Law.

1. *The NLRA Provides A Much Closer Analogy.*

In railing against the Section 10(b) limitations period, Respondents repeatedly lose sight of the fact that the Court requires a "closer analogy" to support federal borrowing—not a "perfect" one. *See DelCostello*, 462 U.S. at 172. It is perhaps this purblindness that explains several of Respondents' pointless distinctions between the two acts. For example, Respondents note that in only some instances where WARN notification is required does the NLRA also impose a notification duty upon the employer. Thomas Br. 28. Although this statement is

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[3] The superiority of federal borrowing is amply demonstrated by *Owens v. Okure*, 488 U.S. 235 (1989), in which the Court revisited the § 1983 limitations period issue in order to determine which of several state personal injury statutes should be applied to a particular § 1983 claim. Such confusion would also likely plague any attempt by this Court to select a uniform state limitations period for WARN, given the prevalence of multiple limitations periods in the state statutes that Respondents allege are analogous.

true, it fails to disprove North Star's dispositive contention: that the NLRA provides a *closer* analogy to WARN than any available state statute. Respondents fail, for example, to point to any Pennsylvania statute that provides *any* nexus with a cause of action for failure to receive notification of a workforce reduction.

Curiously, Respondents devote very little effort to buttressing the Third Circuit's primary anti-analogy argument: that WARN is a "substantive" statute, while the NLRA's focus is "procedural."[4] Thomas Br. 23-24; Steelworkers Br. 23-25; Government Br. 16-18. Moreover, none of the Respondents attempts to disprove North Star's principal contention on this point: that the NLRA also creates "substantive" rights, including perhaps the most significant substantive right existing in the labor field—the Section 7 right to engage in concerted activity. *See* North Star Br. 22. Without rebuttal of this critical point, there is scant evidence to support the appellate court's conclusion that WARN and the NLRA are not analogous.

Remarkably, Respondents also try to show that the references to the NLRA in WARN are insignificant and are focused on limiting WARN's effect on collective bargaining. Steelworkers Br. at 26-27 n.21; Thomas Br. 26. Had NLRA borrowing been limited to the explicit provisions contained in the WARN statute, Respondents'

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[4] Respondents' "substantive" argument focuses on the Court's decision in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), to show that plant closing notification statutes are not analogous to the NLRA. This reliance is misplaced. The statute at issue in *Fort Halifax*, contrary to Respondents' contentions, did not require employers to give prior notice of plant closings. Instead, it provided for the payment of a one-time, lump-sum severance in the event of a plant closing. More fundamentally, the *Fort Halifax* case had nothing to do with the selection of a limitations period for federal law. Rather, the Court was concerned with whether federal law preempted the state lump-sum statute—an issue clearly unrelated to this, or any other, potential WARN matter. *See* 29 U.S.C. § 2105 (WARN does not preempt other statutory rights).

position would be no more than an overstatement. *See* 29 U.S.C. § 2101(a)(4) (incorporating NLRA definition of "exclusive representative" into WARN). However, given the Labor Department's comprehensive borrowing of NLRA provisions for its implementing regulations, and the judiciary's extensive reliance on NLRA principles to shape WARN decisional law, Respondents' position is absurd.[5] *See* North Star Br. 20-21. In contrast, Respondents have failed to point to a single instance where any state law has been called upon to "fill in" a missing provision of WARN.

Finally, Respondents attempt to distinguish between the two federal labor statutes by contending that, unlike the NLRA, WARN has the additional purpose of alleviating the burden caused by job loss on the affected employees' *communities*. Government Br. 20-21; Thomas Br. 25 n.15. However, while WARN does require employers to notify local government of "plant closings" and "mass layoffs," 29 U.S.C. § 2102(a)(2), it would be a gross overstatement to argue that this notification requirement is a major thrust of the Act—indeed, North Star knows of no lawsuit involving the failure to provide government notification. More significantly, the legislative history of the NLRA indicates that concern about the impact that strikes and layoffs had on communities played *at least as significant a role* in the passage of that act as it did for WARN. *See Legislative History of the National Labor Relations Act, 1935*, NLRB Commemorative Publication, vol. II at 2915-16, 2962 (1985).

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[5] Even the government inadvertently calls attention to the close interrelationship between WARN and the NLRA. *See* Government Br. 20 ("By mandating 60 days' notice for all workers, Congress clearly intended to supplement existing rights under the NLRA."). The supplementation of existing statutory rights is strong evidence supporting the borrowing of the original statute's limitations period. *See Reed*, 488 U.S. at 319 (borrowing limitations period already established for other constitutional rights).

2. *The Pennsylvania Statutes Suggested By Respondents Are Not Analogous To WARN.*

Recognizing that the Court's current limitations test requires the affirmative consideration of "available state-law source[s]," *Lampf*, 501 U.S. at 357, Respondents attempt to compensate for the Third Circuit's failure to perform this essential analysis by suggesting their own "analogous" Pennsylvania statutes. Their efforts provide North Star with perhaps its strongest proof that there is no state statute analogous to WARN, and that the adoption of a uniform federal limitations period is necessary to avoid protracted "conflict, confusion, and uncertainty." *Wilson*, 471 U.S. at 266.

Respondents *themselves* cannot agree on which Pennsylvania statute is "most" analogous to WARN. In fact, Respondents have actually advocated different analogies in different courts. At the appellate level, the Thomas Respondents contended that "[t]he best choice, in our view, is the three years allowed by 43 Pa. Stat. Ann. § 260.9a(g) for bringing claims under the Pennsylvania Wage Payment and Collection Law. ('WPCL')." Thomas Appellate Br. 33. Now, before this Court, the Thomas Respondents take another approach, arguing that "the best choice among state limitations periods is the one chosen by a number of federal courts for WARN—state law statutes governing actions on contract." Thomas Br. 38-39 (citing two four-year Pennsylvania contract limitations periods, 42 Pa. Cons. Stat. Ann. §§ 5525(3) and (4)) (footnote omitted).

For its part, the government adopts the position taken by the Thomas Respondents in the court of appeals but abandoned by them in this Court. It prefers to apply the Pennsylvania WPCL. Government Br. 27. The Steelworkers, on the other hand, refuse to commit to either the WPCL or a state contract limitations period. They suggest either would be appropriate, and argue, alternatively, that "Pennsylvania's six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527, could be applied." Steelworkers Br. 13 n.8. The Thomas Re-

spondents also see a viable "alternative" in the Pennsylvania residual statute, and further suggest as a "final possible state analogy" Pennsylvania's two-year limitations period for enforcing civil penalties and forfeitures, 42 Pa. Cons. Stat. Ann. § 5524(5) (1994). Thomas Br. 40.

Respondents' failure to produce a coherent, uniform alternative to application of the NLRA is no doubt attributable to one uncontrovertible fact: like most states, Pennsylvania does not have a statute that is even remotely analogous to WARN. No Pennsylvania statute, and no principle of Pennsylvania common law, gives rise to an action based on notice of a plant closing or mass layoff. By contrast, of course, the NLRA, *does* recognize a cause of action for an employer's failure to give adequate displacement notification.

Pennsylvania's four-year contract period, suggested as the "best choice" by the Thomas Respondents, provides a particularly poor analogue to WARN. WARN provides for payment of damages in the event that employees are laid off without proper notice. Accordingly, a cause of action under WARN seeks to enforce a right created by statute. Pennsylvania contract law, on the other hand, does not protect any statutory rights, but rather applies to actions alleging breach of a private-party contract. Under WARN, however, a contractual relationship, is entirely immaterial—the Act applies independently of any contractual obligation and covers both at-will employees and workers with employment agreements. *See Halkias*, 31 F.3d at 235 ("no contractual right to continued employment is implicated by WARN").

The government's suggestion of an analogue between WARN and the Pennsylvania WPCL equally is erroneous. Previously, the Third Circuit specifically rejected application of the WPCL to the similar worker dislocation provisions of the Airline Deregulation Act on grounds that the WPCL is "premised on a contractual obligation that an employer has to pay wages and benefits, not a statutory right like the one here." *Haggerty v. USAir, Inc.*,

952 F.2d 781, 786 (CA3 1992) (footnote omitted). Indeed, the trial court in this case rejected the Thomas Respondents' earlier assertion of the WPCL for this very reason:

> The Wage Payment and Collection Law does not create an employee's right to compensation but only establishes a right to enforce the payment of wages and compensation to which an employee is otherwise entitled. The Worker Adjustment and Retraining Notification Act differs from the Pennsylvania Wage Payment and Collection Law in that the former creates a statutory right to monetary damages when an employer violates its provisions.

Pet. App. 19a (citations omitted). *See also Georgia-Pacific v. Unemployment Compensation Bd. of Review*, 157 Pa. Commw. 651, 667, 630 A.2d 948, 956-57 (1993) (under Pennsylvania law, WARN payments do not constitute "wages").

Respondents' "alternative" selections for state law borrowing—Pennsylvania's six-year "residual" statute of limitations and the state's "civil penalties and forfeiture act" —are even less analogous to WARN. In *Agency Holding*, 483 U.S. at 152-53 (citing *Wilson*, 471 U.S. at 278), the Court specifically rejected application of Pennsylvania's residual limitations period to RICO on the grounds that Congress would not have intended the application of a "catch-all" *state* residual limitations period to a federal enactment. Likewise, Respondents have failed to cite to a single case supporting application of a "civil penalty or forfeiture" provision to WARN. This is not surprising, given that the relief Respondents would be entitled to under WARN—back wages for sixty days—is not a civil penalty or forfeiture.

The above discussion confirms the Sixth Circuit's conclusion about analogizing WARN to state law: "[t]he only commonality between WARN and the proferred state statute [of limitation] is that both are pieces of legislation." *United Mine Workers v. Peabody Coal Co.*,

38 F.3d 850, 856 (CA6 1994), *petition for cert. filed*, 63 U.S.L.W. 3644 (Feb. 16, 1995). It underscores this Court's previous observations that "[s]tate legislatures do not devise their limitations periods with national interests in mind," *Occidental*, 432 U.S. at 367, and that "state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law." *DelCostello*, 462 U.S. at 161. As the conflicting views of the Respondents demonstrate, only the selection of the NLRA as a uniform, national limitations period for WARN can end the pointless struggle to find some trace of analogy to WARN in the interstices of state law. Given the clear analogy between WARN and the NLRA, such a struggle with state analogy is not only unnecessary, but also unwise.[6]

C. Respondents Fail to Refute North Star's Argument That Both Federal Policies And The Practicalities Of Litigation Support The Borrowing Of Federal Law.

In addition to requiring a "closer analogy," the Court's existing doctrine requires North Star to show that "the federal policies at stake and the practicalities of litigation" favor federal borrowing. In its initial brief, North Star pointed to several such policies and practicalities: *i.e.*, the need for uniformity, the danger of forum shop-

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[6] Alternatively, Respondents suggest that, if state law is not sufficiently analogous, the Court should borrow the two-year limitations period contained in the federal Portal-to-Portal Act, 29 U.S.C. § 255, instead of the NLRA. Thomas Br. 42-43; Steelworkers Br. 27-29. That the NLRA is clearly more analogous than the Portal-to-Portal Act can be seen by the close interplay between WARN and the NLRA—detailed in North Star's initial brief—and by the fact that the Portal-to-Portal Act concerns only employee entitlements to wages earned for work actually performed. WARN, on the other hand, by its very nature provides an entitlement regardless of any work performed by the employee. Thus, the Portal-to-Portal Act is similar to Pennsylvania's Wage Payment and Collection Law, and the arguments made to address that contention are equally applicable here. Not surprisingly, this alternative federal analogy has not garnered any judicial or academic support.

ping, and the appropriateness of a short limitations period for WARN. Respondents challenge these contentions, but their responses cannot overcome the clear practical and policy concerns favoring federal borrowing.

Respondents' arguments as to uniformity and forum shopping are perhaps the feeblest. Respondents make no effort to refute North Star's contention that, even if a single kind of analogous state limitations period could be found and then uniformly applied to WARN, the wide divergence in *length* of such limitations periods would—given WARN's broad venue provision—provide ample opportunity for forum shopping (and lead to the inequitable application of federal rights). North Star Br. 14-18.[7] Respondents' rejoinder to this problem can be summed up in two words: "too bad." Indeed—and remarkably—the government goes so far as to argue against application of even a uniform *state* limitations period—a result completely contrary to this Court's post-*DelCostello* teachings and one that would foretell years of wasteful WARN "characterization" litigation. Government Br. 27-28 n.19.

Rather than denying the availability of forum shopping, Respondents try to downplay its significance by suggesting that Petitioners' concerns are "overstated," and that, given the broad venue provisions of other federal statutes, forum shopping under the WARN Act is "no more problematic than under other federal statutes in which state statutes of limitations are borrowed."[8] *See*

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[7] A complete discussion of the need to apply the NLRA limitations period so as to avoid WARN forum shopping is presented in Peter J. Mignone, *What Statute Of Limitations Should Apply To The Worker Adjustment And Retraining Notification Act?*, 63 Fordham L. Review 1418 (1995).

[8] The consolidated case, No. 94-835, demonstrates that North Star's forum shopping concerns are not "overstated." Instead of bringing suit in Georgia, the Steelworkers travelled to Pennsylvania—a decision which not only provided them with a favorable limitations ruling, but may also increase their potential recovery

Steelworkers Br. 18-20; Thomas Br. 10; Government Br. 25-26.[9] Respondents' argument that WARN forum shopping problems are "not any worse" is hardly a compelling justification for applying state law; in any event, the argument is also factually incorrect. What makes the prospect of forum shopping particularly troublesome under WARN is the difficulty in characterizing WARN claims under any *particular* state cause of action, the divergent length of limitations periods available for even the same kind of potentially-applicable state statutes, and the multistate nature of many WARN transactions.[10] It

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of damages through application of the Third Circuit's expansive interpretation of WARN damages. *Compare United Steelworkers v. North Star Steel Co.*, 5 F.3d 39 (CA3 1993) (damages of 60 *calendar days* available), *cert. denied*, 114 S. Ct. 1060 (1994) *with Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275 (CA5 1994), *cert. denied*, 115 S. Ct. 933 (1995) (damages limited to *work days within* 60 calendar days).

[9] The government's advocacy of this position is incredible given that, in its recent amicus curiae brief in *Carpenters District Council*, it took *exactly the opposite position*. Arguing against the Fifth Circuit's limitation of WARN damages to work days *within* 60 calendar days (instead of 60 calendar days), the government stated: "However this conflict is resolved, the WARN Act should be uniformly interpreted and applied. . . . [C]oupled with the Act's liberal venue provision, which permits a suit in 'any district in which the violation is alleged to have occurred, or in which the employer transacts business,' 29 U.S.C. 2104(a)(5), the current conflict is an invitation to widespread forum shopping." *Id.* at 16. The government illustrated its point by providing the troubling example of a Louisiana employee bringing a WARN action in Pennsylvania, where "the employer happens to transact business," to take advantage of more favorable WARN precedent. *Id.* at 16 n.13. Without explanation, the government has now abandoned these concerns. It appears that the government's position on WARN is motivated more by political expediency than by dedication to the effective and appropriate administration of the Act. *See* Frank Swoboda, *Clinton Woos Traditional Party Allies; President Courts Labor In Drawing The Lines*, The Washington Post, February 22, 1995, at A1.

[10] In *Peabody Coal*, for example, the United Mine Workers, unlike the Thomas Respondents, did not argue that its WARN claim should be governed by the state contracts limitations period—no

is these specific dangers unique to WARN that require the reliance on a uniform federal limitations period.[11]

As a final argument against federal borrowing, Respondents contend that the six-month limitations period contained in the NLRA is simply too short a period of time in which to require WARN plaintiffs to bring suit, and that the federal interest in speedy resolution of employment disputes is not applicable to WARN. Neither contention is meritorious.

As noted in North Star's initial brief, many WARN actions brought to date have been filed within six months of their accrual—clearly suggesting that application of the NLRA limitations period will not present an undue burden to future litigants. North Star Br. 29. Nonetheless, Respondents claim that the existence of certain "relatively complex issues" makes it inequitable to require potential plaintiffs to file WARN suits within six months. Chief among Respondents' concerns is the scenario in which a layoff is initially announced as temporary, but later triggers WARN notification requirements when it lasts beyond six months. Thomas Br. 37; Steelworkers Br. 29 n.23. (*See* 29 U.S.C. § 2102(c), layoffs lasting less than six months do not trigger WARN notification requirements). According to the Thomas Respondents, "if the employer does not announce at the outset that the layoff or closing is permanent, prospective plaintiffs must make the [difficult] judgment whether the layoff is likely to last more than six months." Thomas Br. 37.

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doubt because the Kentucky period applicable there would have led to a 15-year limitations period. *See* Ky. Rev. Stat. Ann. § 413.090(2). As this example illustrates, even uniform "characterization" of a limitations period will result in wildly divergent and inappropriate applications for WARN.

[11] Forum shopping would not have troubled the Court in *Wilson* or *Owens* because, given the necessity for "state action," § 1983 claims must generally be brought where the public entity is located—thus forum shopping is not possible. *See Davis v. Louisiana State Univ.*, 876 F.2d 412, 413 (CA5 1989).

Respondents' position on this point is erroneous—and, demonstrates that the "equities" here do not favor their position. For despite Respondents' assumption to the contrary, WARN is clear that, in circumstances where an employer announces a layoff as being only temporary, the claim does not accrue and the limitations period would not begin running until six months have passed and the employees have not returned to work. 29 U.S.C. § 2102(c); 54 Fed. Reg. 16041, 16049 (WARN Final Rule, 1989); *Halkias*, 825 F. Supp. at 126, *aff'd*, *supra*; *Automobile Mechanics Local 701 v. Santa Fe Terminal Servs., Inc.*, 830 F. Supp. 432, 434-35 (N.D. Ill. 1993).

Accordingly, the reality in the instant case—and indeed, the reality in many of the most difficult WARN lawsuits—is that the Thomas Respondents actually had *one year from the date of their layoff to timely commence their action.* Indeed, the Steelworkers, who previously brought a successful suit against North Star stemming from the same layoff, managed to file their claim within *two weeks* of the date that the six-month layoff was triggered.[12] North Star Br. 3. Despite that suit, the Thomas Respondents waited an additional 13 months—more than 20 months after their layoff—to bring this suit. Under these circumstances, Respondents' suggestion that they were not reasonably able to timely file their action under an applicable NLRA limitations period is without merit.

Finally, Respondents contend that there is nothing in WARN to suggest that "speedy resolution" of WARN claims was a legislative priority. Indeed, they argue that the traditional federal policy favoring quick resolution of

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[12] Respondents' insinuation that some sort of adverse inference should be drawn from North Star's "failure" to assert a statute of limitations defense in the earlier Steelworkers action (Thomas Br. 2; Government Br. 4 n.1) is erroneous. The Steelworkers' claim was timely under a Section 10(b) limitations period following accrual.

labor and employment disputes is not applicable to WARN, but rather only to claims stemming from collective bargaining, actions by "non-discharged" employees, and actions that may be brought in administrative fora. Steelworkers Br. 14; Thomas Br. 33-35; Government Br. 8, 16. None of these statements are correct.

As explained in North Star's initial brief, the legislative history of WARN, as well as subsequent administrative and judicial interpretations, fully supports North Star's contention that WARN was designed to afford *prompt* remedial relief to dislocated workers—not damages to such individuals years after the fact.[13] North Star Br. 28-32. One commentator recently summarized this congressional intent as follows:

> The argument that WARN requires a longer statute of limitations also neglects to consider Congress' purpose in passing WARN. By enacting WARN, Congress intended to provide short-term assistance to employees, their communities, and local governments to accelerate retraining, relocation, and reemployment. To achieve this purpose, it is important that workers claim and receive this relief promptly after discharge. A limitation period permitting a worker to recover on a WARN claim several years after the violation obviously fails to further this objective.

Mignone, 63 Fordham L. Review at 1457.

Respondents also are wrong to suggest that federal policy favoring "speedy resolution" is limited to administrative matters stemming from the collective bargaining disputes of "non-discharged" employees. Many federal employment suits having nothing to do with collective bargaining have extremely short limitations periods. Title

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[13] The Steelworkers even acknowledge the short-term purpose behind WARN, conceding that WARN was intended to "soften the blow" of employment loss, and "enable affected employees to arrange their finances and begin their search for other employment." Steelworkers Br. 25.

VII, for example, requires employees to hire a lawyer and bring suit within *ninety days* of the termination of EEOC proceedings—proceedings that must be initiated by the employee within either 180 or 300 days of the triggering event. 42 U.S.C. §§ 2000e-5(e), (f). Moreover, the majority of employment discrimination suits, including those filed under the Age Discrimination in Employment Act ("ADEA"), are brought by terminated workers who have no "continuing relationship" with their employers.[14] Accordingly, the federal interest in speedy resolution of employment disputes is not limited to collective bargaining, and is fully applicable to WARN.

II. THE CONTINUED RETENTION OF THE COURT'S FLAWED LIMITATIONS BORROWING DOCTRINE IS NOT JUSTIFIED.

Respondents also take issue with North Star's call for reform of the Court's limitations borrowing doctrine. The most thoughtful response on this point, from the Thomas Respondents, concedes that there would be advantages to a presumption favoring federal borrowing—most notably uniformity—but suggests that Congress has not sufficiently signalled its desire for such a change and, besides, altering the presumption now might breed more litigation than it would resolve. Thomas Br. 43-46. Neither criticism, however, can withstand serious scrutiny.

First, it must be recognized that the primary justification for the Court's existing doctrine—that Congress "intends by its silence that we borrow state law," *Agency Holding*, 438 U.S. at 147—is premised on only the most tenuous of legislative fictions. Commentator Kaulbach provides a particularly well-reasoned argument against this presumption:

> [T]here are good reasons to refrain from interpreting congressional silence as endorsement. Congressional

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[14] Many WARN notification situations *do* involve continuing relationships—most notably where the obligations are owed to unions, and to employees suffering a "mass layoff."

> inaction can be attributed to many factors. For example, it is generally acknowledged that it is much easier to kill a bill than to pass one. Congress may find the matter too trivial to deserve attention, or may ignore it simply out of inertia. Congress may, in fact, have no strong preference on the issue and thus will acquiesce to any judicial rule. Alternatively, members of Congress may disagree with the judicial rule but find themselves unable to agree on a particular alternative. Moreover, the silent acquiescence of a subsequent Congress in the interpretation of a statute is not probative of the original, enacting Congress' intent.
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> These general observations are particularly apt in the context of limitations periods. Limitations periods are hardly glamorous legislative issues, and are likely to seem in less urgent need of legislative attention than many other problems. Since it is a fairly technical legal problem, Congress may well be content to delegate the responsibility for setting the rules to the judiciary.

Kaulbach, 77 Cal. L. Rev. at 155-56 (footnotes omitted).[15]

Given the flimsiness of the "silence" presumption, it is erroneous to argue, as Respondents do, that the sponsors of the 1990 "fallback" statute of limitations, 28 U.S.C. § 1658 (which prospectively imposes a federal limitations period on *future* federal statutes that do not themselves

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[15] Another commentator has observed that "after 1983, the year of the *DelCostello* opinion, arguments that congressional silence implies Congress' approval of borrowing from state law begin to lose weight. And as additional Supreme Court cases borrowing from federal rather than state sources appear, see, for example, *Agency Holding*, 483 U.S. 143 (1987), the implications of Congressional silence become [even more] unclear." Andrew R. McCarroll, *Borrowing A Limitations Period For The Worker Adjustment And Retraining Notification Act: An Occasion For The Supreme Court To Rethink Its Preference For State Law*, at 9 n.39 (Feb. 24, 1995) (on file with the Vanderbilt Law Review). Here, WARN was enacted by Congress in 1988, several years after the automatic presumption of state limitations borrowing ended.

specify a time limitation), did not sufficiently signal Congress' displeasure with the Court's existing state law borrowing presumption. To the contrary, the sponsors stated their displeasure firmly and directly:

> At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Borrowing, while defensible as a decisional approach in the absence of legislation, [appears] to lack persuasive support as a matter of policy.

136 Cong. Rec. S17,581 (daily ed. Oct. 27, 1990) (statement of Sen. Biden).

Despite this clear congressional rebuke, Respondents contend that another "negative inference" should be gleaned from Congress' failure to include in the "fallback" bill any limitations period for pre-existing federal statutes, such as WARN, that then lacked such periods. While this inference is dubious for the reasons stated above, it is also contrary to the legislative history. That history indicates that the reason why Congress did not set limitations periods for pre-existing statutes in 1990 was that—in addition to lacking the political will to undertake such excruciating analysis—it did not wish to, without further analysis, upset the "settled expectations" of potential litigants. *See* H.R. Rep. No. 734, 101st Cong., 2d Sess. 24 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6860, 6870. In this regard, Congress was expressing its concern for altering the limitations periods of statutes, such as 42 U.S.C. § 1983, for which limitations periods *had already been borrowed*—and not for recently-enacted statutes, such as WARN, that had no such "settled expectations." *Id.* Accordingly, Respondents are wrong to suggest that the "fallback" statute demonstrates anything other than congressional intent favoring the adoption of uniform federal limitations periods for all federal statutes where the limitations periods are unsettled.

Additionally, the above analysis rebuts Respondents' other principal contention—that a shift to a presumption

favoring federal borrowing would require this Court to revisit the limitations periods for statutes for which the issue already has been settled. This was not Congress' intent in passing the fallback statute, and no recognized jurisprudential principle would require it. Rather, the following approach could be taken: "[a]s individual cases arise where there are no settled expectations about the proper limitations period," the courts should "address Congress' clear concern for uniformity, predictability, and judicial economy by adopting a federal limitations period." McCarroll, at 34.[16]

Given these practicalities, the time has come for this Court to end the "conflict, confusion, and uncertainty" caused—and demonstrated in this litigation—by the Court's existing practice of borrowing state limitations periods for federal laws. It should replace this flawed doctrine with a presumption favoring the uniform borrowing of federal law. As commentators have noted, this change is overdue:

> The Court should consider adopting uniform national limitations rules to govern all federal claims—implied and express—for which Congress has failed to enact a limitations rule. The Court has earlier declared that "[f]ew areas of the law stand in greater need of firmly defined, easily applied rules than does the subject of periods of limitations." Those attributes distinguishing federal claims "fundamentally" from state laws, such as concepts unknown to the common law and interstate transactions, characterize many federal claims. The policies advanced by adopting uniform limitations periods—certainty, pre-

[16] McCarroll notes that one method of accomplishing such borrowing would be to keep the tests articulated in *DelCostello* and *Lampf*, with one modification: "The preference should shift from borrowing state to borrowing federal law. Thus, under *DelCostello*, if a rule from federal law provides a close analogy, and federal policies and the practicalities of litigation are not frustrated by choosing the federal limitations period, then federal law should be borrowed. Only when federal law offers no analogy should the courts look to state law." *Id.* at 34-35 (footnote omitted).

> dictability, and minimization of litigation—would be promoted by uniform periods for all federal statutes. In an age of multistate activity largely regulated by federal rather than state law, the state borrowing rules may also be an anachronism.

105 Harv. L. Rev. at 409 (footnotes omitted). *See also* Kaulbach, 77 Cal. L. Rev. at 136 (arguing that Court should abandon its presumption favoring state law borrowing).

Applying these principles here, it is clear that the NLRA's six-month statute of limitations period should be borrowed for WARN. Given the obvious lack of analogy between WARN and the various suggested state causes of action, the clear resemblance in purpose and structure between WARN and the NLRA, and the manifest federal need for uniformity in the application of this federal statute, the Section 10(b) limitations period should now be adopted for WARN.

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded with instructions to reinstate the district court's judgment in favor of North Star.

Respectfully submitted,

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